

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALVIN ROYBAL, JERRY B. SANCHEZ,
and ANSELMO SMITH,

Plaintiffs,

vs.

Civ. No. 13-0025 KG/KBM

CITY OF ALBUQUERQUE,
RICHARD J. BERRY, Mayor,
ROBERT PERRY, Chief Administrative Officer,
VINCENT YERMAL, Director of Human Resources,
MARY SCOTT, Dep. Dir. Human Resources,
BRUCE RIZZIERI, Transit Department Director,
CITY LABOR-MANAGEMENT RELATIONS BOARD,
PAUL I. FORNEY, Attorney,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon Defendant Paula Forney's Motion to Dismiss Defendant Paula Forney (Motion to Dismiss), filed on July 1, 2013. (Doc. 49). Plaintiffs have not responded to the Motion to Dismiss. *See* (Doc. 58). Having reviewed the Motion to Dismiss, the Court grants the Motion to Dismiss for the following reasons.

Forney moves to dismiss all of the claims brought against her in Plaintiffs' First Amended Complaint for Violations of Constitutional and Contractual Rights and Wrongful Termination, Abuse of Process, and Prohibited Labor Practices (Doc. 26) (First Amended Complaint) for failure to serve the First Amended Complaint on her. Fed. R. Civ. P. 4(m) provides:

If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time.

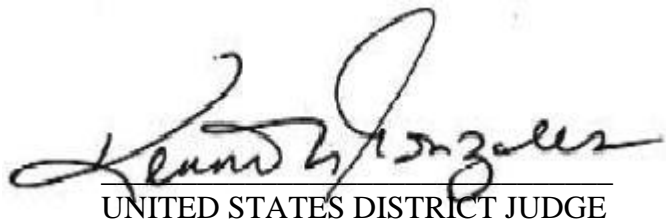
But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

In applying Rule 4(m), the Court first determines whether Plaintiffs have shown good cause for failing to timely effect service. *Espinoza v. United States*, 52 F.3d 838, 841 (10th Cir. 1995), *cert. denied*, 520 U.S. 1176 (1997). If Plaintiffs show good cause, then the Court must extend the time to effect service. *Id.* If Plaintiffs do not show good cause, then the Court must decide if a permissive extension of time to serve is warranted. *Id.* “At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service.” *Id.*

In this case, Plaintiffs have not provided any explanation, let alone good cause, for failing to serve the First Amended Complaint on Forney. The Court notes that Plaintiffs’ counsel has sued Forney, a City of Albuquerque attorney, in several other employment cases. Plaintiffs’ counsel is aware of where to serve Forney and has, in fact, served her previously. *See Salazar v. City of Albuquerque, et al.*, Civ. No. 13-00162 JCH/RHS. In addition, it is noteworthy that Plaintiffs filed the First Amended Complaint well over a year ago. Considering these circumstances, the Court determines that it is appropriate to dismiss Plaintiffs’ claims against Forney without prejudice for failure to comply with Rule 4(m).

IT IS ORDERED that:

1. the Motion to Dismiss Defendant Paula Forney (Doc. 49) is granted; and
2. Plaintiffs’ claims against Forney will be dismissed without prejudice.



UNITED STATES DISTRICT JUDGE